

EXHIBIT A

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
)	
Reexamination of Roaming Obligations of)	WT Docket No. 05-265
Commercial Mobile Radio Service Providers)	
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Reply Declaration of Harold W. Furchtgott-Roth

January 26, 2006

Summary

I have been asked by T-Mobile, within the context of the Communications Act and Commission rules, to review and evaluate the economic arguments and evidence in the comments filed in WT Docket No. 05-265. I reach the following conclusions:

1. Neither the economic theory nor the empirical information in the record provides an unambiguous definition of markets containing roaming services, and consequently of economic concepts related to those markets;
2. Even if there were a clear definition of markets containing roaming services, the record indicates that most roaming arrangements work well, and dissatisfaction with such arrangements is the exception rather than the norm;
3. Even if there were widespread problems with automatic roaming, regulation of automatic roaming or roaming agreements must rely on general rather than specific Commission authority, which would seem to require a level of certainty in the record that has not been met;
4. Even if the Commission had specific authority to regulate automatic roaming, the costs of regulating automatic roaming are likely to exceed the benefits;
5. Even if the benefits of regulatory intervention were to exceed the costs, the Commission has less invasive means at its disposal other than industry-wide rules to address problems associated with contracts between carriers;
6. Even if the Commission does not address automatic roaming, parties aggrieved in the negotiation of roaming agreements can avail themselves of various remedies at law outside the Commission.

I. Introduction

A. Qualifications

My name is Harold W. Furchtgott-Roth. Since 2003, I have been president of Furchtgott-Roth Economic Enterprises, an economic consulting firm. I have consulted on a variety of topics, including both regulatory and antitrust matters. I am chairman of the board of the Telecommunications Policy Research Conference, one of the primary forums for research on telecommunications issues in the United States. I chair the board of Oneida Partners, a wireless communications company. I am on the board of MRV, a publicly traded telecommunications manufacturing company. I serve on several advisory boards.

From June 2001 through March of 2003, I was a visiting fellow at the American Enterprise Institute for Public Policy Research (AEI) in Washington, DC. At AEI, I completed the manuscript for a book, *A Tough Act to Follow: The Telecommunications Act of 1996 and the Separation of Powers*, which will soon be published by the AEI Press.

I was a Commissioner of the Federal Communications Commission (FCC) from November 1997 through the end of May 2001. My statements as a Commissioner at the FCC have been cited by federal courts.

I have worked for many years as an economist. From 1995 to 1997, I was chief economist of the House Committee on Commerce where I served as one of the principal staff members helping to draft the Telecommunications Act of 1996.

My academic research concerns economics and regulation. In addition to the forthcoming book, I am the coauthor of three books: *Cable TV: Regulation or Competition*, with R.W. Crandall, (Washington, DC: The Brookings Institution), 1996; *Economics of A Disaster: The Exxon Valdez Oil Spill*, with B.M. Owen, D.A. Argue, G.J. Hurdle, and G.R. Mosteller, (Westport, Connecticut: Quorum books), 1995; and *International Trade in Computer Software*, with S.E. Siwek, (Westport, Connecticut: Quorum Books), 1993. I am a frequent commenter on matters before the Federal Communications Commission, and daily newspapers, including the *Wall Street Journal*, have published my opinion pieces. I have a weekly column in the business section of the *New York Sun*. I have testified on many occasions before committees of the U.S. Senate and House of Representatives. I received my undergraduate training at MIT, and I received a Ph.D. in economics from Stanford University. My resume is attached as Appendix A.

B. Purpose of This Reply Declaration

I have been asked by T-Mobile, within the context of the Communications Act and Commission rules, to review and evaluate the economic arguments and evidence in the comments filed in WT Docket No. 05-265 on or about November 28, 2005.

C. Findings

I have reviewed the record including both the widespread satisfaction with market-based contractual arrangements for automatic roaming expressed by many comments¹ as well as the complaints about specific difficulties and failures of some

¹ See comments filed in this docket by ACS Wireless for voice services, Centennial Communications, Cingular, Nextel Partners, North Dakota Network Company, Sprint/Nextel, U.S. Cellular, and Verizon Wireless.

companies to negotiate automatic roaming agreements with other carriers,² usually those with a specific technology.³

I find that the record does not provide a sufficient economic foundation for the Commission to promulgate new rules for automatic roaming. I organize my comments around the following observations:

1. Neither the economic theory nor the empirical information in the record provides an unambiguous definition of markets containing roaming services, and consequently of economic concepts related to those markets;
2. Even if there were a clear definition of markets containing roaming services, the record indicates that most roaming arrangements work well, and dissatisfaction with such arrangements is the exception rather than the norm;
3. Even if there were widespread problems with automatic roaming, regulation of automatic roaming or roaming agreements must rely on general rather than specific Commission authority, which would seem to require a level of certainty in the record that has not been met;
4. Even if the Commission had specific authority to regulate automatic roaming, the costs of regulating automatic roaming are likely to exceed the benefits;

² See comments in this docket submitted by AIRPEAK Communications and Airtel Wireless, Leap Wireless, MetroPCS Communications, National Telecommunications Cooperative Association, NTCH, Inc., Rural Cellular Association, Rural Telecommunications Group and OPASTCO, Safe Competition Coalition, and SouthernLINC.

³ Some comments focus on the difficulties of negotiating with iDEN carriers. “Current IDEN market forces do not promote roaming, and thereby, a ubiquitous, competitive CMRS marketplace for CMRS subscribers.” AIRPEAK Communications and Airtel Wireless comments at 6; “SouthernLINC Wireless has experienced great difficulty over the years in its attempts to negotiate a roaming arrangement with Nextel (prior to its recent merger with Sprint) [the only nationwide iDEN carrier] and its partially-owned affiliate Nextel Partners.” SouthernLINC comments at 3.

5. Even if the benefits of regulatory intervention were to exceed the costs, the Commission has less invasive means at its disposal other than industry-wide rules to address problems associated with contracts between carriers;
6. Even if the Commission does not address automatic roaming, parties aggrieved in the negotiation of roaming agreements can avail themselves of various remedies at law outside the Commission.

II. Neither the economic theory nor the empirical information in the record provides an unambiguous definition of markets containing roaming services, and consequently of economic concepts related to those markets

Both the NPRM and the filed comments in this proceeding frequently refer to concepts of economic markets such as “market power.” Some comments *assume*, without verification, that the relevant product or service markets are as narrow as roaming with a specific technology;⁴ other comments *assume* that the relevant service market is as broad as all CMRS services at both the wholesale and retail levels, while the geographic dimensions of these markets are also unverified. Other comments implicitly *assume* various market definitions when they speak of the presence or absence of various market conditions. Remarkably, neither Commission precedent nor the submissions in this docket provide empirically verifiable definitions of markets that include roaming

⁴ “AIRPEAK and Airtel believe that the current CMRS market forces, at least within the marketplace for iDEN networks in which they operate...,” AIRPEAK Communications and Airtel Wireless comments at 5. The Leap Wireless comments refer to a “CMRS market” at least 29 times, but also describe separable markets by technology at least once: “For this reason, there are three separate wholesale markets for digital roaming services in each region: a CDMA market, a GSM market, and an iDEN market.” “Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service: An Economic Analysis.” Attachment by ERS Group, at 8. RTG frequently refers to a market for roaming. See e.g., RTG Comments at 2. SouthernLINC explains that, while retail service providers compete across technologies, roaming is limited by technology at the wholesale level. “These practices indicate not only the existence of market failure in the provision and availability of roaming for iDEN carriers ...,” SouthernLINC comments at 3.

services. Consequently, the discussions of market power and other market-related concepts found in the record before the Commission are vague and imprecise to the extent they have economic meaning at all. Although it is conceivable that some providers of roaming services in some wireless markets in the United States might exercise some form of market power, it appears impossible with the record in this docket unambiguously to identify those markets or those providers.

A. *The Commission does not appear previously to have found roaming or specific roaming technologies to be separate markets*

The NPRM rarely refers to a “roaming market” and never to “markets” associated with specific roaming technologies.⁵ The NPRM refers to “market” 75 times, but usually in the context of “CMRS market”⁶ or “wireless market”⁷ or “market power.”⁸ Only three references are made to a “roaming market,”⁹ and these instances are without specific explanation of how roaming differs from other markets. The Commission does not formally explain or even suggest that roaming or a specific technology for roaming is a separate market. Most references to roaming in the NPRM are without a description of a separate market for roaming.

The Commission has evaluated roaming in the past and has refused to adopt a narrow market definition related to roaming or a definition based on a specific wireless network technology (e.g., CDMA, GSM, iDEN).¹⁰ The burden of proof would appear to be on those seeking to change the prevailing Commission view from one that does not

⁵ FCC, Docket 05-265, NPRM, August 31, 2005.

⁶ See, e.g., Ibid, at 2.

⁷ See, e.g., Ibid, at 4.

⁸ See, e.g., Ibid, at 9.

⁹ See Ibid, at 8 and 18.

¹⁰ See FCC, Docket 00-193. See also FCC, Order In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations File Nos. 0001656065, et al., FCC 04-255, Rel. Oct. 26, 2004 (“AT&T/Cingular Merger Order”) para. 180.

specifically recognize a separate economic market for roaming into one that does. That burden has not been met in the record in this docket.

Each year, pursuant to Section 332(c) of the Communications Act,¹¹ the Commission prepares a report to Congress on the state of competition in the CMRS industry. In the ten annual reports prepared so far, the Commission has examined roaming and identifies it as a characteristic of the CMRS industry, but has not described it or examined it as a separate market. Given the specific statutory instruction that refers to the obligation of the Commission to “review competitive market conditions” and to provide “an analysis of those conditions,” the Commission would reasonably be expected to examine the “competitive market conditions” for roaming if the Commission held it to be a separable market, or for roaming by technology if those were held by the Commission to be separable markets.¹² Moreover, the Commission does not collect separate information on roaming by carrier and by technology. Thus, the Commission’s analyses of wireless competition and its related information collection activity do not provide a basis of information to determine whether either roaming generally or roaming by a specific technology is a separate market.

In the context of recent mergers, the Commission occasionally refers, without quantitative evidence, to roaming as a separate market,¹³ but one in which recent mergers

¹¹ “The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition.”

¹² Perhaps the Commission uses the report to focus on retail rather than wholesale offerings, but the statutory language would appear to give it scope to examine roaming “markets” and competition in those “markets” if it chose to do so.

¹³ See, FCC 05-148, Memorandum Opinion and Order, August 8, 2005, at 17: “Finally, we also consider the potential vertical harms of the proposed transaction on the CMRS roaming market and separately

have had no adverse effect.¹⁴ The Commission has refrained from imposing substantial conditions with respect to roaming.

B. No empirical evidence in the record supports a specific market definition in which automatic roaming services are offered.

1. Economics provides an empirical framework for market definition.

Economists usually examine economic behavior in a market, the realm of exchange for buyers and sellers of a product or service. Markets are delineated with boundaries both by the scope of a product or service and by geography. The boundaries of markets depend on the responses of buyers and sellers to changing prices and other factors, and these boundaries can be—and often are—tested with empirical techniques.¹⁵ In evaluating both mergers and complaints under antitrust law, the federal antitrust agencies usually rely on quantitative information and studies to help determine the boundaries of economic markets. The same empirical techniques can be applied to determine the market boundaries for roaming, such as whether roaming services with different technologies are in the same or different markets, and whether wholesale roaming is in a different market from retail CMRS services.

2. Comments provide no empirical evidence to define boundaries for markets that include roaming.

conclude that the merger will not adversely affect competition in the market for roaming services or raise rates that would be passed through to consumers.” Of 54 references to roaming in the Order, only two refer to markets. Of 551 references to markets, only 2 refer to roaming. In the Alltel-Western Wireless merger, the Commission has 104 references to roaming, but only 3 refer to a roaming market, and those references merely echo statements from comments in the proceeding. See FCC 05-138, Memorandum Opinion and Order, July 19, 2005.

¹⁴ FCC 05-148, at 46.

¹⁵ For example, rather than anecdotes or assertions, economists would use empirical techniques to determine whether apples and oranges are in separate product markets or in the same broader market for fresh fruits in Washington, D.C. The relevant information to consider would be demand and supply responsiveness of apples and oranges to the price of each as well as to other factors that might influence demand and supply conditions such as the prices of other fresh fruits. The conceptual test for market boundaries is usually the antitrust definition of a market, the smallest group of products or services for which a hypothetical monopolist could profitably raise prices for a non-transitory period. See *Department of Justice and Federal Trade Commission Merger Guidelines*, (1992).

None of the comments in this proceeding provides a verifiable empirical basis to define relevant markets for roaming. The only submission in the record that uses a clear analytical framework to define the relevant market concludes that it is retail CMRS services rather than wholesale roaming services.¹⁶ Many comments provide isolated fragments of quantitative information that might ultimately be useful in assessing market boundaries, but these fragments do not provide a complete description, much less a verifiable test, of the boundaries of markets including roaming services. Thus far, the record does not support an unambiguous definition of either service or geographic markets that contain roaming services.

Rather than directly define the relevant market for roaming, several comments instead address two characteristics of roaming: (1) the absence of interchangeability for roaming between different CMRS technologies; and (2) the observed price differences among wholesale roaming charges, wholesale Mobile Virtual Network Operator (MVNO) charges, and retail rates. Although these comments are insightful, they do not by themselves help define relevant markets.

3. The present absence of interchangeability for roaming between different CMRS technologies does not determine market definition

Several comments correctly observe that most consumers with handsets based on one technology currently cannot roam on networks with a different technology. Absence of interchangeability, however, does not by itself define economic markets. For example, size C and size D batteries are not interchangeable. Flashlights requiring size C batteries

¹⁶ See, Gregory Rosston, "An Economic Analysis of How Competition Has Reduced Roaming Charges," November 2005, at 11-14, attached to Sprint Nextel Comments in this proceeding. Those comments, rather than presenting a new verifiable empirical analysis, interpret the FCC's prior findings in the order approving the merger of Cingular and AT&T Wireless in 2004.

cannot use size D batteries and vice versa. These facts by themselves are not sufficient to conclude either that size C and size D batteries are in different economic markets or that flashlights using one battery size are in a different economic market from those using a different size. Conclusions regarding market definitions require empirical tests and evidence, not merely statements of interchangeability.

Whether GSM roaming is a separate service market depends on whether a hypothetical monopolist of GSM roaming services in a geographic area could profitably raise the wholesale prices of those GSM roaming services for a non-transitory period. The answer may depend on whether sufficient GSM retail customers would switch to non-GSM services in response to roaming price increases as to make a GSM roaming price increase unprofitable. With the Commission's introduction of wireless local number portability, there are few if any regulatory barriers to such switching. If sufficient switching were to occur as to make a price increase unprofitable, GSM roaming could not be a separate market. Thus, empirical evidence is necessary to ascertain whether various roaming alternatives with different technologies are in the same or in different markets. Such evidence is not directly and systematically provided in the record.

4. Observed price differences among wholesale roaming charges, wholesale MVNO charges, and retail rates do not determine market definitions

As an alternative to empirical analyses of market boundaries, some comments interpret price differences among wholesale roaming charges, wholesale MVNO charges, and retail rates as evidence of price discrimination and a basis to examine market

definition.¹⁷ The evidence presented in these comments of price differences or price discrimination is anecdotal rather than a comprehensive review of all roaming arrangements and prices in all markets.¹⁸ Moreover, although in a well-defined market price differences for the same product with the same cost-structure can indicate price discrimination, the record in this proceeding describes differences in prices for services that have different cost structures¹⁹ and may well be in different markets.²⁰ Thus, the record describes price differences for different services (that may or may not have the same cost structure and that may or may not be in the same service market) offered by some carriers in a few geographic markets. While puzzling and perhaps even troubling based on the limited information given, these descriptions of price differences do not illuminate service market boundaries, much less indicate price discrimination in every instance.²¹

Moreover, comparisons of average revenue per minute for a fixed-price retail plan with the incremental costs of a single minute of wholesale roaming do little to delineate markets or to rationally describe the competitive conditions for either a carrier's retail

¹⁷ See particularly ERS Group, "Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service: An Economic Analysis," Attachment A to Comments of Leap Wireless, at 14-19.

¹⁸ Ibid.

¹⁹ None of the comments provides an empirical description of all of the various costs associated with automatic roaming services (e.g., contract negotiation, software, verification procedures, handling of customer information, billing and collection, dispute resolution, etc.) much less any of the other services with which roaming is compared. The ERS Group comments describe some but not all of these cost differences (ERS Group at 9-14). The ERS Group focuses only on customer acquisition costs and customer care and billing costs while ignoring other costs of providing services (ERS Group at 12-13).

²⁰ As noted above, the record verifiably neither rejects nor fails to reject any hypothesis of market structure for roaming, much less for other services such as MVNO resale or own-customer services. Whether any or all of these are in the same market is never verifiably tested. Differences in cost structure also suggest entirely different markets for the services.

²¹ Leap (at 13-14) and the ERS Group (at 9-14) examine differences between roaming rates for small carriers, resale rates to MVNOs, and retail revenues per minute for large carriers. As noted above, roaming, retail, and resale have different cost structures and may be in different markets. Price differences among roaming, retail, and resale may reflect many factors other than price discrimination.

plan or its wholesale roaming rates.²² Average retail revenue per minute for a flat-rate plan is not a particularly relevant concept when the incremental revenue for each additional infra-marginal minute of usage is zero.²³ In contrast, carriers incur additional costs for each additional minute of roaming. Even with multiple competitors, the market prices for an incremental minute of roaming and the average retail revenue for a flat-rate wireless plan are only coincidentally related. The flat-rate plans reflect many costs: primarily fixed costs which do not vary with the minutes of use (such as customer acquisition, billing and collection, network maintenance, network investment, customer service, and handset costs); and some variable costs, which do vary with the number of minutes used (such as roaming and long-distance). With or without competition, one can construct scenarios where per-minute roaming costs are either higher or lower than average retail revenues per minute of service.

An analogous situation occurs for wireline services where customers usually pay a flat rate for local service regardless of the minutes of usage and often a variable cost for long-distance services.²⁴ In many if not most local wireline markets one would observe that incremental long-distance rates (say, for example, 5 cents per minute) are different from the average revenue per minute on the local service plans. The inference should not be drawn, however, that local and long-distance services are inherently different markets, much less that local service is inherently more (less) competitive than long-distance service simply because the average revenue per minute for local services is less (more) than long-distance per-minute charges.

²² Leap (at 13-14) and ERS Group (at 9-14).

²³ Additional minutes that are less than a rate plan's maximum number of minutes yield no additional revenue. Those above the rate plan maximum yield additional revenue usually at high rates.

²⁴ Increasingly, however, these plans are being replaced with flat rate plans that include both local and long-distance services.

5. Without clear market definitions, economic terms in the record are at best ambiguous and possibly meaningless.

Rather than empirical evidence on boundaries for markets that would include roaming services, the record contains many anecdotes and observations about roaming that provide an incomplete picture of the entire range of market structures, both in terms of the range of services that are in the same market for roaming and the geographic breadth of these service markets. Absent unambiguous definitions for the markets that include roaming services, the use of economic terms such as “monopoly,” “duopoly,” “market power,” and others is correspondingly lacking of clear meaning. Without a more complete and verifiable picture of the boundaries of markets that include roaming services, the Commission cannot make a reasoned and defensible judgment about whether any entity exercises “market power,” or “monopoly power” with respect to roaming services.²⁵

III. Even if there were a clear definition of markets containing roaming services, the record indicates that most roaming arrangements work well, and dissatisfaction with such arrangements is the exception rather than the norm.

Taken as a whole, under any market definition, the record does not support a finding of universal problems with the current contractual structure of automatic roaming arrangements.

- A. *Without regulation, automatic roaming agreements have benefited both carriers and consumers*

Contracts that are mutually beneficial, and where negotiation and transaction costs are less than the expected benefits of the contracts, develop between private parties

²⁵ In the NPRM, the Commission asks questions with respect to market power, but never defines the relevant market.

without government mandates;²⁶ a private party does not willingly enter a contract not perceived as beneficial relative to the alternative of declining the contract.²⁷ Automatic roaming thus at the very least benefits the carriers that enter such agreements. Voluntary agreements enhance social welfare,²⁸ and automatic roaming agreements are such voluntary contracts. Several comments note that most roaming rates have fallen substantially over the past decade, and these declining roaming rates have doubtlessly benefited consumers.

B. Automatic roaming is a service, consistent with Commission rules, offered pursuant to contracts—not filed tariffs—between CMRS carriers.

While the record does not have unambiguous empirical evidence on the structure of markets that include roaming services, the record does suggest that problems related to automatic roaming potentially in need of government review are the exception rather than the norm. Automatic roaming is neither required nor regulated, yet hundreds of contracts between carriers for automatic roaming have developed. No central clearinghouse counts all of these mutually beneficial contracts, but in this proceeding alone individual carriers describe hundreds of such contracts.

The terms and conditions of mutually beneficial automatic roaming agreements are negotiated and are not necessarily identical. As these contracts are private agreements and not filed tariffs, they are not part of the record in this proceeding. There is no reason to believe that each negotiated roaming agreement is identical any more than contracts for other services are or should be identical. Several comments refer to the variety of terms and conditions of these contracts.

²⁶ This is a variation on Coase's theory of social welfare from transactions. See R. Coase, "The Problem of Social Cost," *Journal of Law and Economics*, 3, 1960.

²⁷ Ibid.

²⁸ Ibid.

C. Some carriers are satisfied with the structure of automatic roaming contracts.

Some small and mid-sized carriers are satisfied with the current absence of regulation of automatic roaming.²⁹ Other small and mid-sized carriers are not satisfied.³⁰ Descriptions of problems with automatic roaming are not industry-wide involving *all* small carriers and *all* large carriers. Complaints are heavily focused on the relationships between individual small carriers and individual large carriers using a specific network technology³¹ and in some instances roaming with new technologies.³²

Although some comments cite specific examples of individual carriers allegedly denying or discriminating in negotiating roaming contracts to certain parties,³³ substantial evidence is also presented that automatic roaming agreement are common, widespread, without widespread technical problems, often offered universally, and often offered in a reciprocal non-discriminatory manner.³⁴

D. Problems with negotiating and receiving automatic roaming are not universal.

Although some comments cite specific conditions under which some carriers may have economic incentives to deny roaming contracts to certain parties or to discriminate in the terms of roaming contracts,³⁵ no comments suggest that any carrier has economic incentives to refuse roaming of its network to customers of all other carriers or to refuse

²⁹ See ACS Wireless Comments (for voice but not for data) at 5-6; Centennial Comments at 5; North Dakota Networks Comments, and U.S. Cellular Comments.

³⁰ See carriers listed in footnote 2.

³¹ See comments of SouthernLINC, and Joint Comments of AIRPEAK Communications and Airtel Wireless regarding difficulties of negotiating roaming with Nextel.

³² See ACS Wireless comments related to roaming with EVDO technology.

³³ See Joint Comments of AIRPEAK Communications and Airtel Wireless, SouthernLINC, and Leap Wireless.

³⁴ See T-Mobile comments.

³⁵ See, e.g., comments of Leap Wireless and SouthernLINC.

its own customers opportunities to roam on all other networks. Other comments indicate some carriers have incentives to offer roaming universally with reciprocity.³⁶

The record does not support a finding that difficulties negotiating automatic roaming agreements are universal because the record contains substantial evidence that many carriers negotiate beneficial contracts. A more compelling foundation for a new form of Commission regulation of automatic roaming, but one not found in the record, would be widespread if not universal collapse of negotiations for roaming agreements. Such is simply not found in the record.

E. The comments contain no complaints with respect to T-Mobile.

The individual complaints in the comments are not lodged against *all* large carriers. None of the comments contain specific complaints about T-Mobile. Nothing in the record supports a conclusion that T-Mobile discriminates in the provision of roaming. Even the carriers that request the Commission to regulate roaming make no specific allegation regarding T-Mobile. T-Mobile offers reciprocal roaming arrangements to other facilities-based carriers with customers³⁷ for several reasons including the following:

- it is mutually beneficial;³⁸
- T-Mobile does not want to lose roaming business to Cingular, a larger GSM carrier;³⁹ and
- If GSM roaming is inefficient for T-Mobile, dissatisfied customers could switch to other carriers with other technologies.⁴⁰

³⁶ See comments of T-Mobile.

³⁷ See Declaration of James Martinek.

³⁸ T-Mobile at 3.

³⁹ T-Mobile Comments at 7-8.

- Indeed, T-Mobile offers reciprocal roaming arrangements to *any* carrier and has roaming agreements with GSM carriers throughout the United States.⁴¹

More broadly, if customers are dissatisfied with the service provided by T-Mobile or other GSM carriers—including roaming services and roaming charges — customers can easily switch to CDMA or iDEN services, which also discipline T-Mobile’s roaming arrangements. Local number portability and other services facilitate switching among wireless service providers. Customer acquisition costs are high for wireless carriers in part precisely because of churn, customers leaving one wireless carrier for another.

Imposing regulations for roaming universally on all carriers under all circumstances—even for carriers for which there is no record of behavior or outcomes in need of any form of regulation—would lead to much higher costs and fewer consumer benefits. This outcome will be discussed in more detail in Section V below.

IV. Even if there were widespread problems with automatic roaming, regulation of automatic roaming or roaming agreements must rely on general rather than specific Commission authority, which would seem to require a level of certainty in the record that has not been met.

If the Commission were to regulate automatic roaming agreements, it must do so not based on specific statutory instructions, but based on general discretionary authority.⁴² Given the breadth of its discretionary authority, the Commission might reasonably eschew purely discretionary rules or—where rules are deemed necessary—

⁴⁰ Ibid at 6.

⁴¹ See Declaration of James Martinek.

⁴² E.g., Sections 4, 201, 301, 332.

insist that they be narrowly tailored to apply only to those circumstances where the expected benefits clearly exceed the expected costs.⁴³

The Commission rarely regulates, without specific statutory authority, in response to allegations of abuse of market power, either the availability of contracts between carriers or the terms and conditions of such contracts except as required by law.⁴⁴ For example, the Commission has considered, but has declined, to impose resale requirements not required by statute between CMRS carriers.

Commission rules currently require manual but not automatic roaming. Neither automatic nor manual roaming is a statutory concept and neither appears in the Communications Act. Yet the Act is capable, where Congress views such action as necessary, of instructing the Commission to write rules governing mandatory negotiation of contracts in good faith⁴⁵ or the filing of common carrier tariffs. On roaming, Congress is silent.

V. Even if the Commission had specific authority to regulate automatic roaming, the costs of regulating automatic roaming are likely to exceed the benefits.

If the Commission were to attempt to write rules for automatic roaming in this proceeding, the Commission should consider whether the likely benefits of those rules would exceed the likely costs.⁴⁶ None of the comments quantifies either the benefits or the costs of new regulations.⁴⁷

⁴³ The FCC in the NPRM is aware of the need evaluate both the costs and benefits of any proposed new regulation. See NPRM at paragraph 18.

⁴⁴ Examples of such regulation of contracts between carriers are provisions under Section 252.

⁴⁵ See, e.g., Section 252 for interconnection agreements.

⁴⁶ See NPRM at 12.

⁴⁷ Several comments describe qualitatively the benefits and costs of roaming rules, but none attempts a quantification of benefits and costs.

A. *The likely benefits of universal mandatory automatic roaming rules are small and concentrated on a few carriers.*

The likely benefits of mandatory automatic roaming agreements are small. If voluntary automatic roaming agreements consistently, uniformly, and universally failed, the Commission might potentially reason that requiring such contracts would have substantial benefits. But the record in this proceeding reveals the opposite: voluntary automatic roaming agreements are widely available and have generally succeeded. Many carriers, including some of all sizes and all technologies, claim the current system of unregulated automatic roaming is working well.

The record suggests possible isolated cases where voluntary agreements have not succeeded, but these instances appear to be the exception rather than the general rule. Carriers dissatisfied with the status quo do not have grievances with all other carriers; indeed, the record provides no specific allegations against T-Mobile. A new regulation governing automatic roaming that broadly applied to the entire industry could thus be expected at most to generate incremental new automatic roaming agreements only in those exceptional cases where voluntary agreements fail to develop today. As discussed later in this section, those rules could also lead to substantial new costs where voluntary arrangements flourish today.

For many carriers and apparently for the vast majority of American wireless consumers, mandatory automatic roaming rules would appear to have few if any benefits. These carriers and consumers already benefit from voluntary roaming agreements. Some comments suggest benefits of automatic roaming rules where voluntary agreements have not developed, but these benefits would appear to accrue just to those carriers that have

not been successful in negotiating voluntary agreements. A general rule for the entire industry would thus appear to benefit only a small portion of the industry.

Nor can the benefits of a potential automatic roaming rule even apply to an identifiable portion of the industry such as small and mid-sized carriers. While some of these carriers suggest that a rule would be beneficial, others do not. At least one national carrier, T-Mobile, already offers reciprocal agreements and has automatic roaming agreements with other GSM carriers throughout the United States, both large and small.⁴⁸

B. The likely costs of mandatory automatic roaming rules are large.

Even if there were a more compelling record for the benefits of regulation, that alone would not be enough for Commission consideration. The Commission should weigh the costs as well as the benefits of a proposed regulation; nothing in the record addresses fully the costs of new regulation of roaming services.

Although there are exceptions, restricting by regulation potential terms and conditions of contracts will lead to fewer, not more, voluntary contracts. Regulatory requirements would lead to fewer not more options for negotiations. The wider the range of terms that can be negotiated between parties, the more likely they are to find areas of mutual benefit through one or more contracts.

Regulation could also harm existing automatic roaming agreements. Regulatory restrictions on roaming agreements could potentially render many if not all of the hundreds of existing roaming agreements unlawful or at least subject to revision. These revisions, were they mutually beneficial, would already have been written into contracts. Thus regulatory-mandated revisions will harm one or even both parties to existing

⁴⁸ See comments of T-Mobile.

agreements. Restricting mutually beneficial contracts harms the contracting parties, and more broadly harms social welfare.⁴⁹

The specific recommendation of capping roaming rates at retail average revenue per subscriber is an inappropriate basis of comparison.⁵⁰ As noted above, roaming rates and retail average revenue per subscriber are only coincidentally related even in competitive markets. A cap on roaming rates based on the retail rates would only coincidentally be the proper competitive price. At least in the wide range of circumstances where voluntary automatic roaming agreements are working well, it is impossible to find any potential benefit to rate regulation. Of all forms of regulation, rate regulation is perhaps the most invasive and the least likely to be beneficial, either to businesses or consumers.

Moreover, most roaming agreements are not one-sided agreements but specify roaming rates for both parties. Similar rates and even reciprocal rates between the parties in roaming agreements should reflect a degree of fairness and symmetry in roaming arrangements. Capping roaming rates at average retail revenues per subscriber minute would have at least two perverse results on current contractual roaming agreements: (1) many currently negotiated roaming agreements would find both parties out of compliance with the cap; and (2) because average revenue per subscriber minute varies by carrier, the capped roaming rates would lead to asymmetric maximum roaming rates with one carrier paying more to the other for roaming based not on a negotiated contract but based on the randomness of the unrelated average revenue per subscriber minute. Such a form of

⁴⁹ See Coase, 1960.

⁵⁰ See Leap Wireless comments at 19-20.

regulation might predictably lead to higher negotiating costs between carriers for roaming rights and fewer voluntary contracts.

VI. Even if the benefits of regulatory intervention were to exceed the costs, the Commission has less invasive means at its disposal other than industry-wide rules to address problems associated with contracts between carriers.

The Commission has an obligation to attempt to assist the public. For dissatisfied parties, the Commission can meet that obligation by directing them to the most appropriate means to complain about their situation, whether inside or outside the Commission. Under Title II, the Commission has many methods to help parties with isolated complaints⁵¹ of the form raised in this proceeding without resorting to the writing of new rules. Some of the comments properly focus on clarifying the complaint process.⁵² Outside of creating new rules requiring specific forms of contracts between carriers, the Commission has statutory authority to address many of the concerns including discrimination raised in this proceeding.⁵³

VII. Even if the Commission does not address automatic roaming, parties aggrieved in the negotiation of roaming agreements can avail themselves of various remedies at law outside the Commission.

Issues of regulatory remedies to abuse of market power, where existing statutory language does not directly address the issue, have usually been resolved by Congress, not the Commission.⁵⁴ Some of the allegations of abuse of market power may better be addressed under antitrust law than communications law.

⁵¹ See NPRM at 2.

⁵² See, e.g., comments of ACS Wireless at 6-7; and comments of SouthernLINC at iii.

⁵³ See comments of T-Mobile, particularly at 18-19.

⁵⁴ CMRS provisions in 1992 and the Telecommunications Act of 1996.

VIII. Conclusion

Even if all of the alleged improper conduct by carriers in this docket were true, it does not follow that the Commission must or should write broad, industry-wide rules governing automatic roaming. The record simply does not provide much of the information that the Commission would need to write rational and defensible rules. Complaining parties have remedies, both at the Commission and elsewhere, to remedy instances of improper conduct.

I declare under penalty of perjury that the foregoing is true and correct.


Harold Furchtgott-Roth

Executed January 26, 2006

APPENDIX A

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Experience

Furchtgott-Roth Economic Enterprises, President
(2003-present).

Economic consultant.
Business columnist, *New York Sun*, May 2004 – present.

American Enterprise Institute, Visiting Fellow
(2001-2003).

Federal Communications Commission, Commissioner
(1997-2001).

One of five commissioners responsible for U.S. communications policy, rulemaking, enforcement, and adjudication. Among other responsibilities, reviewed all major mergers in communications sector. For statements, speeches, and other information, see <http://www.fcc.gov/commissioners/previouscommish.html>

Committee on Commerce, U.S. House of Representatives, Chief Economist, (1995-1997).

One of the principal staff for the Telecommunications Act of 1996, Balanced Budget Act of 1995, and electricity deregulation legislation for the 105th Congress.

Economists Incorporated, Senior Economist (1988-1995).

Center for Naval Analyses, Research Analyst, (1984-1988).

**Experience
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Stanford University, Research Assistant, and Teaching Assistant for public finance, (1980-1983).

U.S. Department of Energy, Conservation and Renewable Energy Program, Research Assistantship, (1981-1982).

Office of Management and Budget, Intern, (Summer 1980).

Congressional Budget Office, Assistant Analyst, (1978-1979).

U.S. Department of Labor, Pension and Welfare Benefits Program, Intern, (Summer 1977).

MIT, Center for Transportation Studies, Research Assistant, (1976-1978).

U.S. Senate Committee on Appropriations, Internship sponsored by MIT Political Science Department, (Summer 1976).

Education

Ph.D., Stanford University, Economics, 1986

S.B., Massachusetts Institute of Technology, Economics, 1978.

University of South Carolina, 1973-1974.

Honors

Awards for FCC achievements from various civic and business groups

Visiting Fellow, University of Warwick, (Summer 1984).

Research Fellow, Brookings Institution, (1983-1984).

National Merit Scholar, MIT, (1974).

Professional Societies

American Economics Association
Econometrics Society
Federalist Society

Boards

Corporate

MRV Communications

Other

Washington Legal Foundation
Legal Policy Advisory Board
Telecommunications Policy Research Conference,
Chairman
University of Richmond School of Law
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